Zen Courts Sdn Bhd v Bukit Jalil Development Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — PETITION NO 26NCC-42 OF 2011
AZIZUL AZMI ADNAN J
21 JULY 2017

Civil Procedure — Discovery — Application for — Court ordered buy-out of petitioner's shares in first respondent by second respondent — Petitioner applied for discovery of documents needed for valuation of shares by valuer — Whether petitioner entitled to discovery of documents — Rules of Court 2012 O 24 rr 3 & 7

The present application for discovery was based on an action brought by Zen Courts Sdn Bhd ('Zen Courts') against the respondents for minority oppression. On 27 March 2012, the court ordered for the buy-out of Zen Court's shares in the first respondent by the second respondent. For this purpose, the parties agreed to appoint Ferrier Hodgson MH Sdn Bhd ('Ferrier Hodgson') to undertake the valuation of the price of the shares. Zen Courts was dissatisfied with the valuation by Ferrier Hodgson and filed encl 80 for an order that representations be made on the valuation report. The High Court dismissed the application, however when the matter came before the Federal Court, the Federal Court had allowed encl 80. Zen Courts had subsequently made the present application for discovery to obtain documents that it considered were necessary to enable another expert, KPMG to undertake a valuation of the buy-out shares. In addition to the application of general discovery, Zen Courts had also requested for specific discovery of particulars documents. These documents include the minutes and resolutions of board of directors of the first respondent, its financial information as well as the information relation to the development of the master plan for the land. The second and third respondents submitted that the valuation of the jointly appointed expert, Ferrier Hodgson, might only be tested where there was fraud or collusion.

Held, allowing the application for discovery only in respect of documents existed on or before 27 March 2012:

(1) The court disagreed with the argument put forth by the second and third respondents that the valuation of the jointly appointed expert, Ferrier Hodgson, might only be tested where there was fraud or collusion. This was because the Federal Court had already made a determination in this case that it would be permissible for either party to challenge the valuation for the fact that it was unreasonably high or low, and also

because different considerations applied when the valuation of the joint expert was not intended to be binding on the parties, but was merely expert opinion evidence to be taken into account by the court when the court made its determination (see para 37).

(2) Zen Courts would entitled to discovery of all relevant documents that existed on or before 27 March 2012, whether or not such documents were referred or relied upon by the valuer, Ferrier Hodgson for the purpose of its report (see paras 14 & 38).

(3) Discovery would not, however, be ordered on documents that came into existence after 27 March 2012. In the present case, the issue was one of relevancy. The disclosure would only be permitted for as long as the documents sought was relevant to the object of inquiry, which was the value of the shares as of the valuation date. If a document was created after such date, it would not be relevant for the purposes of determining the value of the shares as of that date (see paras 14, 40 & 46).

[Bahasa Malaysia summary

Permohonan semasa untuk penzahiran dokumen adalah berdasarkan satu tindakan yang diambil oleh Zen Courts Sdn Bhd ('Zen Courts') terhadap responden-responden di bawah kausa tindakan penindasan minoriti. Pada 27 Mac 2012, mahkamah memerintahkan pembelian saham Zen Courts di dalam responden pertama oleh responden kedua. Bagi tujuan tersebut, pihak-pihak telah bersetuju untuk melantik Ferrier Hodgson MH Sdn Bhd ('Ferrier Hodgson') untuk membuat penilaian harga saham tersebut. Zen Courts tidak berpuas hati dengan penilaian yang dijalankan oleh Ferrier Hodgson dan telah memfailkan lampiran 80 untuk satu perintah bahawa satu representasi dibuat ke atas laporan penilaian. Mahkamah Tinggi telah menolak permohonan tersebut, namun, apabila permohonan tersebut didengar di Mahkamah Persekutuan dan telah membenarkan lampiran 80. Zen Courts seterusnya membuat permohonon semasa untuk mendapatkan dokumen-dokumen yang bersesuaian untuk membolehkan KPMG, pakar penilai yang lain, untuk membuat penilaian pembelian saham tersebut. Zen Courts juga membuat permohonan penzahiran untuk beberapa dokumen tertentu termasuklah minit dan resolusi responden pertama, maklumat kewangan syarikat tersebut dan apa-apa maklumat-maklumat yang berkaitan dengan pelan induk pembangunan tanah. Responden kedua dan ketiga berhujah bahawa penilaian oleh pakar yang dilantik secara bersama, Ferrier Hodgson, hanya boleh diuji jika terdapat fraud atau kesepakatan sulit.

Diputuskan, membenarkan permohonan untuk penzahiran hanya bagi dokumen yang wujud pada atau sebelum 27 Mac 2012:

(1) Mahkamah tidak bersetuju dengan hujah responden kedua dan ketiga bahawa penilaian oleh pakar yang dilantik secara bersama, Ferrier

Hodgson, hanya boleh diuji jika terdapat fraud atau kesepakatan sulit. Ini kerana, Mahkamah Persekutuan telah membuat keputusan di dalam kes semasa bahawa salah satu pihak adalah dibenarkan untuk mencabar penilaian di atas fakta bahawa ianya terlampau tinggi atau rendah dan juga kerana pertimbangan-pertimbangan lain terpakai apabila penilaian oleh pakar bersama tidak dimaksudkan untuk mengikat pihak-pihak, tetapi hanyalah keterangan pendapat pakar yang perlu diambil kira oleh mahkamah dalam membuat keputusan (lihat perenggan 37).

(2) Zen Courts dibenarkan untuk membuat penzahiran semua dokumen yang relevan yang wujud pada atau sebelum 27 Mac 2012, sama ada dokumen-dokumen tersebut menjadi rujukan oleh penilai, Ferrier Hogson dalam membuat laporannya (lihat perenggan 14 & 38).

(3) Walau bagaimanapun, penzahiran tidakakan diperintahkan ke atas dokumen-dokumen yang wujud selepas 27 Mac 2012. Dalam kes semasa, isunya adalah berkaitan relevansi. Penzahiran hanya akan dibenarkan jika dokumen-dokumen tersebut relevan terhadap objek persoalan, iaitu nilai saham tersebut pada tarikh penilaian. Jika dokumen dibuat selepas tarikh tersebut, ia tidak akan menjadi relevan bagi tujuan penilaian nilai saham tersebut pada tarikh penilaian (lihat perenggan 14, 40 & 46).]

Notes

For cases on application for discovery, see 1(2) *Mallal's Digest* (5th Ed, 2017) paras 3403–3434.

Cases referred to

Collier v Mason (1858) 25 Beav 200 (refd)
Folin & Brothers Sdn Bhd (in liquidation) & Ors v Folin Food Processing Sdn Bhd & Ors [2011] 6 MLJ 585; [2011] 6 AMR 14; [2011] 8 CLJ 141; [2011] 1 MLRA 533, CA (refd)
Lee Kee Choong v Empat Nombor Ekor (NS) Sdn Bhd & Ors [1975] 1 MLJ 134; [1975] 1 MLRA 614, FC (refd)
Manilal & Sons (Pte) Ltd v Bhupendra KJ Shan (t/a JB International) [1990] 2 MLJ 282; [1990] 1 CLJ 623; [1989] 3 MLRH 223, HC (refd)
Yekambaran s/o Marimuthu v Malayawata Steel Bhd [1993] MLJU 96; [1994] 2 CLJ 581; [1993] 4 MLRH 380, HC (refd)
Zen Courts Sdn Bhd v Bukit Jalil Development Sdn Bhd & Ors and another appeal [2017] 1 MLJ 301; [2017] 1 AMR 258; [2017] 2 CLJ 32; [2017] 1 MLRA 354, FC (refd)

Legislation referred to

Companies Act 1965 s 181
Rules of Court 2012 O 24 rr 3, 7

Gopal Sri Ram (Wong Rhen Yen, Emily Wong and David Yii with him) (Dennis Nik & Wong) for the petitioner.
James A Skelchy (James Monteiro) for the first respondent.
Conrad Young (Leong Phaik Leng with him) (Sreenevasan Young) for the second and third respondents.
Karen Wilfred (Wilfred) watching brief for Ferrier Hodgson.

Azizul Azmi Adnan J:

INTRODUCTION

[1] The petitioner in this case, Zen Courts Sdn Bhd ('Zen Courts') made an application in encl 223 for both general and specific discovery under and pursuant to rr 3 and 7 of O 24 of the Rules of Court 2012 against the first and second respondents.

Background

[2] The following background facts have been adapted from the judgment of an earlier decision of this court.

[3] Zen Courts is a minority shareholder in Bukit Jalil Development Sdn Bhd, the first respondent ('JV Co'). The majority shares are held by the second respondent ('Ho Hup'). The third respondent, which also owns a small portion of the shares in JV Co, is a wholly-owned subsidiary of Ho Hup. References in this judgment to counsel for Ho Hup are to be taken to mean counsel acting for both the second and third respondents.

[4] Zen Courts commenced this action in 2011, claiming minority oppression. On 27 March 2012, Abdul Aziz J (as he then was) ordered that there be a buy-out by Ho Hup of Zen Courts' shares in JV Co. Pursuant to the terms of this order, the shares were to have been purchased at a price determined by an independent valuer by reference to the net tangible assets of JV Co as at the date of the order. The valuer was to have been jointly appointed between the Zen Courts and Ho Hup.

[5] The parties agreed to appoint Ferrier Hodgson MH Sdn Bhd to undertake the valuation. Ferrier Hodgson valued Zen Courts' 30% stake in JV Co at RM35.97m. Zen Courts was dissatisfied with the valuation, and applied in encl 80 for an order that (among others):

> i. Representations be made on the Valuation Report dated 31.12.2012 prepared by Messrs Ferrier Hodgson MH Sdn Bhd, in such manner that this honourable court shall deem fit, in particular and including any directions on the filing of affidavits,

the attendance of experts at court to give testimony, and the cross examination of the said experts;

[6] Shortly after, Ho Hup made the application in encl 84 to move the court to make a determination of the buy-out price pursuant to the terms of the buy-out order granted by Abdul Aziz J.

[7] In July 2013, Mary Lim J (as Her ladyship then was), dismissed the application in encl 80 and proceeded to hear and determine the application in encl 84. The appeals against these decisions culminated in the decision by the Federal Court (the grounds for which are reported as *Zen Courts Sdn Bhd v Bukit Jalil Development Sdn Bhd & Ors and another appeal* [2017] 1 MLJ 301; [2017] 1 AMR 258; [2017] 2 CLJ 32; [2017] 1 MLRA 354) in April 2016 to allow the application in encl 80 on its terms and directing encl 84 to be re-heard before the High Court.

[8] When the case came to be before me, the question arose as to whether Zen Courts would be permitted to call a further expert, KPMG, to provide its valuation report on the buy-out shares. The second and third respondents were of the view that Zen Courts would not be so permitted, and filed encl 214 seeking an order that cross-examination be limited to the experts specifically named in the relevant Federal Court order. I dismissed the application on 5 June 2017, ruling that the terms of the Federal Court order did not limit Zen Courts to only cross-examine the named experts. This decision is now the subject of an appeal by Ho Hup.

[9] Shortly thereafter, Zen Courts made this application for discovery, to obtain documents that it considered were necessary to enable KPMG to undertake a valuation of the buy-out shares.

[10] As an aside, the court had initially set down hearing dates in August for the cross-examination of the experts, but because of the outstanding appeal against my earlier decision, the court was informed that there was insufficient time for KPMG, Zen Courts' nominated expert, to prepare its report in time for the hearing. The hearing date was accordingly vacated.

THE APPLICATION FOR DISCOVERY

[11] In addition to the application for general discovery, Zen Courts had requested for specific discovery of particular documents set out in Annexure A of its application. These documents include the minutes and resolutions of the board of directors of JV Co, its financial information such as financial projections for the proposed development of the 60-acre land held by JV Co, as well information relating to the development master plan for the land.

[12] Ho Hup resisted Zen Courts' application for discovery, taking the view that Zen Courts would only be entitled to obtain discovery of all documents to which Ferrier Hodgson had access for the purposes of preparing its valuation report of 30 December 2012, but not otherwise.

[13] JV Co on the other hand adopted a stance of neutrality.

ANALYSIS AND DECISION

[14] In my judgment, Zen Courts would entitled to discovery of all relevant documents that existed on or before 27 March 2012, whether or not such documents were referred to or relied upon by Ferrier Hodgson for the purposes of its report. No discovery would be permitted, however, in respect of any document that did not yet exist as of this cut-off date.

[15] For the purposes of this judgment, I do not consider it necessary to traverse grounds where the law is well settled. In any event, the general principles upon which discovery may be ordered, as set out in cases such as *Yekambaran s/o Marimuthu v Malayawata Steel Bhd* [1993] MLJU 96; [1994] 2 CLJ 581; [1993] 4 MLRH 380, are not disputed between counsel for the respective parties.

[16] The reasons for my decision are best explained in the context of the respective arguments advanced by counsel. I address them in turn in the following paragraphs.

The scope of discovery

[17] It was advanced for Ho Hup that because the avowed purpose of the discovery application in encl 80 was for representations to be made on the Ferrier Hodgson valuation report, the scope of the discovery must be connected to the Ferrier Hodgson report and within the ambit of the order of Abdul Aziz J. For this reason, argued counsel for Ho Hup, Zen Courts would only be entitled to obtain discovery of the same information that Ferrier Hodgson had had in preparing its report.

[18] I respectfully disagree with the contention of counsel. In my judgment, it would be open to Zen Courts to put before the court an alternative valuation produced by its nominated expert, KPMG, to challenge the valuation contained in the Ferrier Hodgson report. Zen Courts would not be limited to just challenging the bases, assumptions and conclusions of the Ferrier Hodgson report in cross-examination, but would be permitted to tender an alternative report by KPMG to demonstrate to the court the reasonableness or otherwise of those bases and assumptions, and how the conclusions will differ given the

changes in the bases and assumptions. Indeed, this is a matter that has already been the subject of a decision by the court, pursuant to Ho Hup's application in encl 214.

[19] It would follow that the nominated expert of Zen Courts ought to have access not only to all documents to which Ferrier Hodgson had access or which it had relied upon for the purposes of its report, but also to all documents that had existed on or before 27 March 2012. If Ferrier Hodgson could have had access to a document but for whatever reason chose not to rely upon or to refer to such document, I see no reason why KPMG ought to be bound by that decision made by Ferrier Hodgson. Indeed, if the object of the application in encl 80 is to challenge the reasonableness of the Ferrier Hodgson valuation, then one way to do so would be to show that it had failed to take into account a relevant consideration in coming up with its report.

The purpose of the representations

[20] This leads me to the second point raised by learned counsel for Ho Hup. Mr Young argued that, because the Ferrier Hodgson report was one that was prepared by an expert jointly appointed by Zen Courts and Ho Hup, the circumstances under which such report may be challenged are limited. Specifically, the decision of a jointly appointed expert in making a valuation can only be challenged for fraud, collusion, partiality and lack of independence. Authority was also cited for the proposition that parties are still bound by a valuation of a joint expert even if the expert had made a mistake, provided that that mistake was one that was made honestly and in good faith.

[21] Although I accept the authorities cited as being good law (and indeed I am bound by them to the extent that they are decisions of superior courts), I am unable to accept the proposition advanced by counsel for two reasons:

(a) first, the purpose for which representations may be made has already been determined by the Federal Court in its decision on encls 80 and 84; and

(b) second, the cases cited are distinguishable because in each of them, the joint expert had been appointed for the purpose of arriving at a valuation to which the parties have expressly agreed to be bound; whereas in the present case, the joint expert Ferrier Hodgson had been appointed to provide expert opinion evidence to court, for the court to determine the final value of the shares that are the subject matter of the buy-out order.

I explain both these points in turn.

[22] The key question before the Federal Court in the appeal on encl 80 was whether the application would fall within matters that were subject to the

parties' 'liberty to apply', or whether the application would be tantamount to a variation of Abdul Aziz J's buy-out order. In answering this question, the Federal Court held as follows:

> [23] Permitting the appellant to make representations on the valuation report by way of cross-examination of the valuation experts, by no account would vary the buy-out order. *In fact, it does make good commercial sense that parties be entitled to challenge any valuation, if it were to be unreasonably high or low in the circumstances of the case.* After having been appraised of the evidence before it, that is after ensuring that the valuation has not taken into account irrelevant considerations, or omitted relevant considerations that fundamentally affect the final value, the High Court may determine the value of the shares. It may thereafter make the necessary order, namely to confirm, vary, or set aside the valuation report, in consonant with the buy-out order. Sub-order (v) which states that 'the court will determine the final value of the shares and the terms of the buy-out order', is not there for decoration but intended for a useful purpose. (Emphasis added.)

[23] The highlighted portion of the passage of the judgment reproduced above makes it clear that the Federal Court was of the view that the parties were at liberty to challenge the jointly appointed expert for the reasonableness of its valuation, and not just for the purposes of impugning their integrity as an independent valuer. For this reason, the issue of the purpose of the representations is a spent one, for it has already been the subject of a final determination by the Federal Court.

[24] This nonetheless leaves me with having to reconcile the determination by the Federal Court in encl 80 with the line of cases cited to me in argument, to the sum effect that the valuation of a jointly appointed expert may only be challenged on grounds of integrity, or, more specifically, on the lack thereof.

[25] Each of the authorities that were cited by learned counsel for Ho Hup were concerned with the situation where the parties, whether by contract or by the terms of a consent order, had agreed to be bound by the valuation produced by the jointly appointed expert. To demonstrate this, a brief foray into the caselaw would be necessary.

[26] The first case is *Collier v Mason* (1858) 25 Beav 200, which provides the authority relied upon in the subsequent cases cited before me. The facts of this case was that the plaintiff had agreed to sell his family mansion to the defendant. They signed an agreement that recorded that the sale and purchase be 'at such a price or sum as should be fixed by reference to BA Englehart, auctioneer and house agent'. The defendant sought to repudiate the valuation arrived at by Englehart. At the trial for specific performance, the defendant called two surveyors, whose average valuations were just 55% of that arrived at by Englehart. Sir John Romilly MR held:

> Here the referee has fixed the price, which is said to be evidence of miscarriage, but this Court, upon the principle laid down by Lord Eldon, must act on that valuation, unless there be some proof of mistake, or some improper motive, I do not say a fraudulent one; as if the valuer had valued something not included, or had valued it on a wholly erroneous principle, or had desired to injure one of the parties to the contract; or even in, the absence of any proof of any one of these things, if the price were so excessive or so small as only to be explainable by reference to some such cause; in any one of these cases the Court would refuse to act on the valuation.

[27] *Collier v Mason* was cited with approval by the Federal Court in *Lee Kee Choong v Empat Nombor Ekor (NS) Sdn Bhd & Ors* [1975] 1 MLJ 134; [1975] 1 MLRA 614. In this case, the High Court had, on a winding up petition, recorded a consent order that the shares of the appellants in the first respondent company be purchased by the remaining contributories in the company 'at a fair and just price to be assessed by a firm of independent accountants to be approved by the court'. The appellant had suggested the appointment of Price Waterhouse & Co, but the parties could not agree on the appointment. The appellant then applied to court for an order appointing Price Waterhouse & Co, which was opposed by the other contributories. Mohamed Azmi J (as he then was) made an order appointing Price Waterhouse & Co.

[28] Price Waterhouse & Co proceeded to make the valuation of the appellant's shares, with which the appellant disagreed. The appellant then applied for the court to reject the valuation and sought to adduce evidence that another firm of chartered accountants had valued the shares more than three and half times higher. Mohamed Azmi J refused this application. On appeal, the Federal Court held:

> In the present case Price Waterhouse did not state in their valuation report the reasons which had led them to arrive at their valuation. There were no directions to them as to whether they were to value the shares on a going concern basis or on the basis of a break-up valuation. There was nothing to suggest on what basis Robert Lim, Kwang & Co arrived at their very much higher valuation of the shares. The order appointing Price Waterhouse directed that all the relevant accounts and books of the company were to be made available to them. This was done, and quite clearly their valuation was based on all the accounts, the accuracy of which had never been challenged by the appellant.
>
> In all the circumstances of the case we could find no justification to go behind the valuation report or allow any further inquiries to be made as to the correctness or otherwise of such valuation. We therefore dismissed the appeal with costs.The appellant subsequently appealed to the Judicial Committee of the Privy Council, which appeal was also dismissed: *Lee Kee Choong v Empat Nombor Ekor (NS) Sdn Bhd & Ors* [1976] 2 MLJ 93; [1976] 1 MLRA 522.

[29] It will be seen that, like *Collier v Mason*, *Lee Kee Choong v Empat Nombor Ekor (NS) Sdn Bhd & Ors* dealt with the situation where the parties had

agreed to be bound by a valuation to be determined by an expert. In the former case, the agreement was recorded in a contract, and the expert was jointly appointed. In the latter case, the agreement was recorded by way of a consent order, and the valuer was a court-appointed.

[30] The final case on point is *Folin & Brothers Sdn Bhd (in liquidation) & Ors v Folin Food Processing Sdn Bhd & Ors* [2011] 6 MLJ 585; [2011] 6 AMR 14; [2011] 8 CLJ 141; [2011] 1 MLRA 533, which concerned a dispute between the liquidators of a company and the minority shareholders in a subsidiary of the company. The parties had agreed, in a consent order, for the company's shares in the subsidiary be bought out by the minorities. The terms of the order included the following:

(1) Ernst & Young to be appointed as expert to value the shares of the 1st Respondent with unfettered and unrestricted access to the books of the 1st Respondent which the exercise is to be completed within 90 days from 4th day of June 2009;

(2) upon ascertainment of a fair price of the shares of the 1st Respondent, a sale and purchase agreement (Sale and Purchase Agreement) is to be entered into between the relevant parties within 30 days;

[31] On the facts, the Court of Appeal found that the valuation had not been made in accordance with the terms of the consent order. Learned counsel for Ho Hup placed reliance on the following passage in the judgment of Zainun Ali JCA (as Her Ladyship then was), which sets out certain principles of general application:

> [46] Firstly, it is well to remind ourselves of the observation of Sir John Romilly MR in *Collier v Mason* [1858] 25 Beav 200, that:
>
> > ... this court must act on the valuation unless there be proof of some mistake or improper motive ...
>
> [47] In other words, where a contract (or in this case consent order) provides for a matter to be decided by an expert, the decision is binding on the parties because that is what they themselves have determined should be the position. However, it is my view this is so only if the expert's decision is a decision which has been made in accordance with the terms of the contract (or consent order as the case may be) and that the decision *will not* bind the parties if the expert, in coming to that decision, had departed from the explicit terms of the instruction to a material extent. (Emphasis added.)
>
> [48] Tuan Hj Abdullah, learned counsel for the third, fourth and fifth respondents was resolute in his view upon my query, that the parties are bound by the expert's decision, *even if grounded on a wrong basis*. (Emphasis added.) With respect I disagree. In my view an expert's decision can be subject to challenge for fraud, collusion, partiality, lack of independence etc.

[49] Although I would agree that the parties are still bound by the valuation even if the expert had made a mistake, this is so only if that valuation was made honestly and in good faith (see *Campbell v Edwards* [1976] 1 WLR 403).

However, Lord Denning in the above case observed that, if there was '... fraud or collusion of course, it would be very different'.

[32] *Folin & Brothers Sdn Bhd (in liquidation) & Ors v Folin Food Processing Sdn Bhd & Ors* is thus a case where the parties had agreed for a valuer to be appointed to determine the fair value of shares, which value was to be binding on the parties for the purposes of a buy-out pursuant to a s 181 petition under the Companies Act 1965.

[33] By contrast, in the present case before me, the parties had not agreed for the jointly appointed expert to determine the price at which the buy-out of Zen Court's shares is to be effected, *but rather to produce a valuation of such shares in order to assist the court to determine the buy-out price*. The role of the expert here is to its provide expert opinion to the court. The determination is not to be made by the expert (as was the case in each of the three cases referred to in preceding paragraphs), but by the court.

[34] That this is so can be seen from the precise terms of Abdul Aziz J's buy-out order, paras (i) and (v) of which are reproduced below:

... IT IS HEREBY ORDERED AS FOLLOWS:

(i) That the second respondent shall buy-out all the 4,500,000 shares of the petitioner in the first respondent, at the price of those shares to be determined by an independent valuer on a 'net tangible asset' basis, such valuation to be as at the date of this order.

...

(v) That *the court will determine the final value of the shares* and the terms of the buy-out order. (Emphasis added.)

[35] The significance of this distinction is material, because the court will be making a determination of fact, viz, the price of the buy-out shares based on the net tangible assets of JV Co. The joint expert is to be appointed for the purposes of assisting the court to make this determination. It follows therefore that the court should have the benefit all relevant information in order to be able to arrive at its determination. Evidence from other experts may be adduced to challenge the opinion proffered by Ferrier Hodgson, including to challenge the opinion on grounds of reasonableness.

[36] By contrast, where the parties have agreed for an expert to determine the transaction price, based on its valuation, it would not lie in the mouth of one party to say that it does not agree with that valuation, for it had agreed on the

mechanism by which the price was to be determined. In this scenario, it stands to reason therefore that the circumstances under which that party may challenge the valuation would be limited, in general to circumstances where the independence or impartiality of the valuer is cast into doubt, or where the valuer had departed from the terms of the agreement between the parties.

[37] In summary, therefore, I disagree with the argument put forth by Mr Young that the valuation of the jointly appointed expert, Ferrier Hodgson, may only be tested where there is fraud or collusion. This is because the Federal Court has already made a determination in this case that it would be permissible for either party to challenge the valuation for the fact that it is unreasonably high or unreasonably low, and also because different considerations apply when the valuation of the joint expert is not intended to be binding on the parties, but is merely expert opinion evidence to be taken into account by the court when the court makes its determination.

[38] Accordingly, for as long as the documents that are in the possession of the respondents are relevant or might possibly be relevant for the purposes of the preparation of a valuation of the shares in JV Co determined by reference to its net tangible assets as at 27 March 2012, then that document ought to be disclosed to Zen Courts. Whether or not Ferrier Hodgson had seen the documents or relied upon them is immaterial.

[39] Guidance as to whether a document sought is relevant is found in the following passage of the Singapore High Court case of *Manilal & Sons (Pte) Ltd v Bhupendra KJ Shan (t/a JB International)* [1990] 2 MLJ 282; [1990] 1 CLJ 623; [1989] 3 MLRH 223:

> Under a general order of court for discovery, a party is obliged to make discovery of all documents relevant to the matters in question in the action. What are the matters in question would depend on the pleadings. A document relates to the matter in question in the action if it contains information which may — not which must — either directly or indirectly enable the party requiring the discovery either to advance his own case or to damage the case of his adversary or which may fairly lead to a train of inquiry which may have either of those two consequences: see *Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55 at p 62. Documents relate to matters in question in the action so long as they are likely to throw light on the case: see *Merchants' & Manufacturers' Insurance Co Ltd v Davies* [1938] 1 KB 196 at p 210.

[40] Discovery will not, however, be ordered on documents that came into existence after 27 March 2012. The reasons are explained in the following paragraphs.

Documents produced after the cut-off date

[41] JV Co has entered into a joint development agreement in 2010 in respect of its real property. Under the terms of this agreement, the development of the property is to carried out over a period of ten years from the date of the approval of the development order of the master layout plan, with an automatic extension for a further period of five years. JV Co would therefore derive income from the development after the date as of which the shares are to be valued for the purposes of the buy-out.

[42] It was advanced for Zen Courts that, because of this, any valuation of the subject shares must take into account the projected future income of JV Co after the valuation date, as well as any risk and liability which may be incurred by JV Co and its joint development partner.

[43] In my judgment, the object of the valuation is to place the inquirer at the point in time of the valuation date, based on whatever information that was known at that time, and taking into account the uncertainties then prevailing about the future. Thus, even if the future cashflows are to be discounted for the purposes at arriving at the net present value of such income streams, these future cashflows must be determined based on whatever information that was available on or before the valuation date. They must necessarily be based on cashflow projections that had existed on or before the valuation date, and cannot take into account actual cashflows that have materialised after such date, or projections that were subsequently made.

[44] It will not be open to KPMG, as the nominated expert of Zen Courts, to have the benefit of knowledge of events that have crystallised into certainty after the valuation date. To do so would equip KPMG with the powers of predestination, and would not be consistent with the terms of the buy-out order.

[45] The distinction in my view is not simply an abstruse point of law, but may have a material or significant effect on the final valuation. For example, if a valuer discounts projected cashflows in order to arrive at the net present value of an asset (with the 'present' being the valuation date, in this case), that projected cashflow must first be imbued with a sufficient degree of certainty. If any part of that projected cashflow is insufficiently certain, the valuer may take the view that that part is to be disregarded. If the valuer is able to look beyond the valuation date, some of those cashflows that were previously speculative could have crystallised into reality. This may result in a different figure than if the valuation were made strictly based on the state of knowledge prevailing as at the valuation date.

[46] In the final analysis, the issue is one of relevancy. The disclosure would only be permitted for as long as the documents sought is relevant to the object

of inquiry, which is the value of the shares as of the valuation date. If a document was created after such date, it would not be relevant for the purposes of determining the value of the shares *as of that date*.

[47] For the reasons set out here, I allow the application for discovery only in respect of documents that had existed on or before 27 March 2012. Orders accordingly. Each party is to bear its own costs.

Application for discovery allowedonly in respect of documents existed on or before 27 March 2012.

Reported by Kamarul Anwar